Johnson-Stewart-Johnson Mining Co., Inc. *and* Anthony Martorana. Case 28-CA-6274

August 4, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On March 15, 1982, Administrative Law Judge David G. Heilbrun issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The Administrative Law Judge found that Respondent did not violate Section 8(a)(1) of the Act by discharging Charging Party Anthony Martorana. In so concluding, he rejected the General Counsel's contention that Respondent discharged Martorana because he made complaints and brought grievances to Respondent concerning employees' conditions of employment.[2] Rather, the Administrative Law Judge found that the reason asserted by Respondent for Martorana's discharge was the true reason; i.e., Martorana's refusal to perform assigned duties. Counsel for the General Counsel excepts, *inter alia*, to the Administrative Law Judge's failure to consider, and to find merit in, her additional alternative contention that, even assuming that the reason asserted by Respondent for Martorana's discharge was the true reason, the discharge violated the Act because Martorana's refusal to perform his assigned duties was protected concerted activity. Although we agree with the Administrative Law Judge's dismissal of the complaint, we do so because we additionally find, for the reasons set forth below, no merit in the General Counsel's alternative argument.

The pertinent facts, as credited by the Administrative Law Judge, are as follows:

Respondent maintains concrete mix and dump trucks for use in making deliveries of construction materials. It employed Martorana as a truckdriver and his driving duties involved regular use of a modern truck. On occasion, however, when the modern truck was unavailable due to mechanical failures, Martorana, like other drivers, would be assigned to operate older used trucks which were uncomfortable and often difficult to operate.

On December 2, 1980,[3] after the truck Martorana usually drove had become disabled, he was assigned to drive one of the older trucks to make a delivery. In the process of making the delivery, the truck experienced such problems as faulty steering, noisy vibrations, and a broken door. After completing the deliveries, Martorana returned to the plant and told Plant Manager Crosson that the truck was a "disaster." In accordance with company procedure, Martorana submitted a written report to Respondent concerning the truck's problems. After Martorana had left the plant, Respondent's mechanics made the necessary repairs to the truck. Thus, when Martorana reported to work on December 4, the problems that he had complained about with the truck on December 2 no longer existed.

On December 4, when Respondent's dispatcher gave Martorana a workcard which indicated that he was again assigned to drive the same truck that he had complained about on December 2, Martorana, without comment, returned the card to the dispatcher and left the plant. The following morning Martorana was terminated by Crosson for the stated reason that he had refused to drive his assigned truck on December 4. Martorana then protested that the truck was still unsafe and Crosson insisted at that time that the truck was not unsafe.

Based on the foregoing facts, counsel for the General Counsel contends that Martorana reasonably believed that the truck he was assigned to drive on December 4 was unsafe, that Martorana's refusal to drive the truck was protected concerted activity, and that Martorana's discharge for refusing to drive the truck is a violation of Section 8(a)(1).

Protesting an unsafe working condition can be protected activity under the Act if the employee so protesting has a good-faith, reasonable belief that such a condition exists.

Here, the undisputed evidence is that Respondent had established procedures for drivers with

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] While we agree with the Administrative Law Judge that Respondent did not violate the Act in this regard, we do not rely on his finding concerning employee Kiemel's interpretation of certain remarks made by Plant Manager Crosson.

[3] All dates are in 1980.

trucks which required repairs. Thus, Martorana testified that

> You'd park the truck on the line which is where you [would] park [it] during the night . . . then you make up a repair report . . . and then the mechanics pick up the [report] and repair the truck . . . .

Martorana also testified that, after the repairs are complete, the mechanics return the truck to "the line." Moreover, Martorana admitted that it is the responsibility of the drivers to ascertain whether their trucks have been repaired and that this was accomplished by inspecting the line for the truck. Martorana further indicated that it was not Respondent's policy to inform drivers when repairs were completed on their trucks.

Counsel for the General Counsel argues that, since the truck had been in Respondent's repair shop, it was more reasonable for Respondent to inform Martorana when the repairs were completed than for Martorana to make inquiries concerning the status of the repairs. We find no merit in this argument since Martorana himself testified that it was not Respondent's policy to inform drivers when truck repairs were completed. We are also not persuaded by counsel for the General Counsel's argument that a finding that Martorana had a good-faith belief that the truck was unsafe on December 4 is supported by Martorana's undisputed testimony that subsequent to his discharge he reported the truck to the Arizona OSHA. His conduct in so doing is not evidence that Martorana reasonably believed that the truck was unsafe when he refused to operate it on December 4.

It is undisputed that Martorana refused to operate his assigned truck on December 4 without making any effort to locate it on "the line" or to inquire if the requested repairs were complete. It is further undisputed that Martorana refused to operate the truck without giving any reason to Respondent for that refusal and we note that Martorana, even at the hearing, could not give any reason for having been so cavalier. Under these circumstances, we find that Martorana's refusal to operate his assigned truck on December 4 was not based on a reasonable belief that the truck was unsafe and that the refusal was therefore not protected under the Act. Accordingly, we conclude that Respondent's discharge of Martorana for refusing to operate the truck was not a violation of Section 8(a)(1).[4]

[4] Since Martorana's refusal to drive his assigned truck on December 4 was not protected conduct under the Act, we find it unnecessary to reach the issue of whether the refusal constituted concerted activity.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard in Phoenix, Arizona, on October 15, 1981, based on a complaint alleging that Johnson-Stewart-Johnson Mining Co., Inc., called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by discharging Anthony Martorana because of his activities as spokesman for other employees regarding matters pertaining to wages, hours, and other terms and conditions of employment, and because he made complaints and brought grievances to Respondent concerning wages, hours, and other terms and conditions of employment of Respondent's employees, including complaints regarding safety which were a matter of common employee concern.

Upon the entire record,[1] including my observation of witnesses and consideration both of oral summation made by counsel at the conclusion of hearing and their post-hearing briefs, I make the following:

FINDINGS OF FACT AND RESULTANT CONCLUSION OF LAW

Until his discharge on December 4, 1980, Martorana had been a driver at Respondent's north plant, a satellite location from which concrete mix and dump trucks operated in the delivery of construction materials to jobsites.[2]

[1] I grant the General Counsel's motion to correct record in 22 of the requested 23 particulars.

Through apparent inadvertence of handling and assembly, the official group of Respondent's exhibits fails to contain its Exh. 1, but instead includes its Exh. 2 twice. The content of Respondent's actual Exh. 1, as received into evidence, may be reconstructed from transcript pp. 77 through 85 as a written employee reprimand of 1978 issued to Martorana for lateness in arriving at a safety meeting and with his acknowledging signature appearing thereon. In view of this remoteness in time, and the peripheral significance of tardiness to essential issues of this case, I believe the record is sufficient to have this substitute description of the document.

[2] Respondent maintains its principal office and place of business in Mesa, Arizona, and is engaged in the preparation, sale, and distribution of ready-mix concrete, gravel, sand, and related products to persons engaged in the building and construction industry and to the general public. During calendar year 1980 Respondent sold goods having a value in excess of $50,000 to M. M. Sundt Construction Company located within Arizona, which in turn furnished goods and services valued in excess of $50,000 and necessary to slip form construction on a joint venture performed in Colorado. During 1980 Respondent purchased approximately $172,400 worth of concrete and admixtures from Master Builders, Division of Martin-Marietta Chemical Corp. Master Builders is headquartered in Ohio and shipped the goods sold to Respondent from a facility in California. On this basis I find that Respondent meets the Board's indirect outflow and direct inflow jurisdictional tests for nonretail establishments, and is thus an employer engaged in commerce within the meaning of Sec.

Continued

In 1979 management sponsored the formation of an employee grievance committee comprised of about 10 rank-and-file members plus several representing ownership interests. Martorana was picked by his fellow employees from among the 35 or so working out of the north plant, and he later attended one formal committee meeting of about 2-1/2 hours' length which was held in Mesa. Martorana testified that he spoke for about an hour on this occasion, bringing up safety problems at the north plant and examples of the often exasperating appearance there by a relative of the owner. While the committee never met again in such structured fashion Martorana continued to function as spokesman for employees concerning conditions of employment. He (along with other employees) would voice matters at the regular safety meetings held throughout 1980 by Plant Manager Morgan Crosson, and in addition he would carry an estimated 80 percent of all rank-and-file complaints brought up with him to Crosson. Subjects included use of seniority for terminations, needed patience with a new employee and with one plagued by illness, balancing hours of work, equity in wage rates paid comparable employees, truck maintenance, and safety. On one occasion around late 1979 to early 1980 an unattended buildup of problems caused Martorana to prevail on Crosson for a special meeting which took place when the overall manager of operations, David Tobey, traveled from Mesa for discussion of operational and paycheck delivery matters.

In the course of things Martorana's driving duties involved regular use of a modern truck numbered 75-575. On the occasions that it was unavailable due to breakdown he, as with other drivers, would be assigned older highly used trucks that were uncomfortable and often difficult to operate.[3] This became the situation on or about December 1 after Martorana's usually assigned truck had blown its engine.[4] He was directed to older, nonboosterized truck number 75-300 and used this in making a nearby delivery of concrete. In the process he experienced the truck door flying open, steering that veered sharply to the right, and mechanical clashing from the innards. He returned from the delivery, colorfully told Crosson that the truck was "disaster," wrote up a report on the problems, parked it, and went home. On the following day Mark Button, morning dispatcher, telephoned him with the option of working or not working and Martorana elected to stay home. He did appear on December 4 at an ordinary starting time, testifying that Button handed him a work card while tauntingly saying, "ha ha . . . you're driving [75] 300 [again]." Upon this Martorana returned the card and went home. When he called that afternoon to check on his work assignment for the next day, Martorana was told to see Crosson in the morning. He did so and was terminated for the stated reason of refusing to drive the truck. Martorana protested that 75-300 was still unsafe and Crosson insisted at the time that it was not.

Robert Kiemel, another north plant driver, testified that immediately after Martorana's discharge he was in the dispatcher's office with Morgan Crosson present. The conversation turned to the subject and he attributed comments to Morgan Crosson about how Martorana had refused to drive a truck and after thinking about it overnight he decided to fire him as an example for other drivers. Kiemel testified to Crosson adding at the time that Martorana had not made any friends with management and complained about a lot of things that were wrong. Crosson did not traverse this episode in his own testimony.

It is essentially these facts on which General Counsel contends that a retaliatory, pretextual discharge in violation of Section 8(a)(1) has occurred. Without the testimony of Kiemel there would be scant grounds on which to base such a conclusion. As developed by Respondent the basic theme of its relationship with Martorana was equanimously tolerant over a long period of time. There was no significant increase in his presentation of grievances during late 1980, and in fact his activity in that regard had concentrated long before. On the General Counsel's alternate theory of the case, Martorana had particularly agitated about safety problems which Respondent itself actively addressed through regular employees safety meetings and general reminders. While the safe operating condition of 75-300 was certainly a point in dispute, it is nevertheless true that the beast was used essentially for emergency backup and short runs. I accept the detailed testimony of Kimble to the effect that, after Martorana's hectic delivery on December 2, the truck door was temporarily repaired, front-end parts were placed to alleviate the steering problem, and noisy drive train vibrations were found to be nonexistent.[5]

On broader grounds this record discloses that by principles of comparative or disparate treatment a standoff

2(6) and (7) of the Act. Respondent's contention that it is not subject to the Board's jurisdiction by reason of being a "purely local" enterprise cannot be sustained. See *Siemons Mailing Service*, 122 NLRB 81 (1958).

[3] All dates and named months hereafter are in 1980, unless shown otherwise.

[4] By one sequence of testimony the events leading to Martorana's discharge occurred December 2-4. By another sequence, including Resp. Exh. 3 showing a report of truck condition and repairs taken thereon plus the testimony of Shop Foreman Kenneth Kimble, the sequence would have been December 1-3. The distinction is insignificant and I adopt Martorana's recollection of the dates involved, noting that the "safety inspection" report may have been simply misdated in the first instance.

[5] Concerning what he did testify to, I find Morgan Crosson to be a highly credible witness on demeanor grounds. He developed the interesting point that Martorana had often complained of his truck radio not working, and when this was checked the radio repair person could not find a problem. Martorana did not deny any of this line of information, and the implication remaining is that Martorana was fudging away his time out of contact with Respondent's operations center at the north plant. I am persuaded from Martorana's mien that he would be tempted toward such convenient disappearance from his Employer's superintending control, and I believe it is significant that this ties in with an evasive nature and manipulative motivations as shown during Martorana's unworthily evasive rebuttal testimony on the matter of whether he should reasonably have understood that truck 75-300 was again ready to operate, albeit balkily, when he arrived for work on December 4. The testimony at transcript pp. 175-177, inclusive, is a highly illuminating sequence showing that Martorana exhibited practically reckless disregard for his obligations as a relied upon driver for the day. In essence he made no effort to locate the truck, and could not even give the General Counsel any semblance of a reason why he had been so cavalier. On a related point I credit the denial of Button that he taunted Martorana on December 4, and that, as Button credibly testified, any discourtesies in the exchange emanated from Martorana. Notably, too, Button credibly corroborates Morgan Crosson on the point of Martorana's mysterious truck radio problems.

results. Respecting two former members of the grievance committee, Ed Civer and Joe Garner, only one even may have been involuntarily terminated, and as to acquiescence in being burdened with truck 75–300 it was driven uneventfully by Richard Putnam on December 4 after Martorana's refusal. While driver Dyess once expressed that he did not want to drive this vehicle, such an outlook was not coupled with overt refusal. A thread of obstreperousness is present in Martorana's behavior, and Crosson credibly and without contradiction testified that upon returning on December 2 from the delivery Martorana had bulled up to the dispatch window saying in the presence of a female customer that he was "not driving that fucking truck anymore, it's a piece of shit."[6] An oddity of note is also present here inasmuch as Button had for some time been telephoning Martorana at his home each morning to ascertain that he was awake, up, about, and on his way into work. This rather cloying consideration was stopped upon Crosson learning of it; however, the implication is that Martorana was being generally favored by at least one person functioning closely with management.

The General Counsel succeeds in establishing the concertedness of Martorana's role in policing his workplace, but does not surmount the vagaries of employment with a substantial body of convincing proof. Given both that any system of progressive discipline was not symmetrically applied in this instance, and that Respondent engaged in overreaching by raising at the hearing stale matters of tardiness and failure to wear a hard hat, the total fact situation fails to persuade that a discriminatory, retaliatory, or unlawful purpose played any part in Crosson's decision. I recognize that the record also stands with Kiemel's undisputed description of intriguing remarks by Crosson shortly after the event; however, this is diluted by Kiemel's clarification that largely personal musings were what he really heard. Further, the mere fact that a thought is verbalized does not necessarily mean it truly formed a basis for action. Finally, Kiemel's testimony is intrinsically less than perfect in attributing a statement of overnight deliberation to Crosson, for the reasonable inference to attach to Martorana having been told on the afternoon of December 4 to see Crosson the following morning was that it was to hear of his discharge as Crosson credibly testified he had decided upon without consultation within the management.

The Board has recently addressed the matter of involved "personalities," which with associated "unseemly squabbles" resulted in adversity not based on any protected activity by the employees. *United States Postal Service*, 260 NLRB No. 9 (1982). The cited case is an apt analogy. I am satisfied that Martorana was not as of early December a particularly valued driver, and his direct refusal to extend a normal cooperativeness to locating, inspecting, and presumably operating the clunker truck was his own undoing. Accordingly, I render a conclusion of law that Respondent has not violated the Act as alleged, and issue the following recommended:

ORDER[7]

The complaint is dismissed in its entirety.

[6] Dispatcher Penny Ellis credibly corroborates Crosson with respect to this utterance.

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.